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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

AARON HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the current objective test for defining which offenses are serious for the purposes of the Sixth Amendment right to a jury trial, set forth in Blanton v. City of North Las Vegas, 489 U.S. 538 (1989), adequately protect a defendant's Sixth Amendment right to a jury trial when the standard operates to deprive a defendant of a jury trial in the case of a third offense of driving while intoxicated and other plainly serious offenses?

Does the objective test for defining which offenses are serious for the purposes of the Sixth Amendment right to a jury trial, set forth in Blanton, adequately protect a defendant's Sixth Amendment right to a jury trial in crimes charged under the Code of Federal Regulations considering that the Secretary of the Interior's determinations as to maximum penalty do not reflect legislative judgment or society's view of the seriousness of offenses?

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PETITION FOR A WRIT OF CERTIORARI

Aaron Hernandez respectfully petitions for a writ of certiorari to review the judgment of the United States District Court for the Eastern District of Virginia and the Fourth Circuit Court of Appeals.

OPINION BELOW

The Fourth Circuit Court of Appeals opinion affirming Mr. Hernandez' conviction is unpublished and The United States District Court for the Eastern District of Virginia at Alexandria Judgment in a Criminal Case included in this petition.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal seeks review of a conviction and sentence imposed by the United States District Court for the Eastern District of Virginia, the Honorable Judge Leonie Brinkema presiding. This action arose under 36 Code of Federal Regulations, Section 4.23(a)(2). The District Court had jurisdiction pursuant to 18 U.S.C 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over a final order subject to appeal. The below order of conviction and sentence are subject to appeal pursuant to Federal Rule of Criminal Procedure 11(a)(2), as Mr. Hernandez preserved his right to appeal the District Court's denial of his motion for a jury trial on the above stated offense. (Fourth Circuit Joint Appendix at 198-99, 205). In an unpublished opinion dated May

6, 2008, the Fourth Circuit Court of Appeals upheld Mr. Hernandez' conviction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the definition of "petty offense" for purposes of the right to a jury trial under the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On November 16, 2006, Mr. Hernandez was charged by information with driving while intoxicated pursuant to 36 C.F.R. 4.23(a)(2), Driving under the influence pursuant to 36 C.F.R. 4.23(a)(1), Refusal to Submit to Blood Alcohol Test pursuant to Possession of Flunitrazapam pursuant to 21 USC 844, Speeding pursuant to 36 CFR. 4.21(c), and Failure to Stay in Lane pursuant to 36 CFR 4.2 (assimilating Va. Code 46.2-804(2)).(J.A. at 11). On February 23, 2007, the Court denied Mr. Hernandez motion for a jury trial on driving while intoxicated under 36 CFR 4.23(a)(2) on the ground that DWI under the CFR was a petty offense under the Sixth Amendment. On March 12, 2007, the government filed a superseding information charging Mr. Hernandez with only two counts – possession of flunitrazapam pursuant to 36 CFR 2.35(b)(2), and with the same driving related offenses charged in the first information. On March 14, 2007, the Court accepted Mr. Hernandez' plea to Count 1 (possession of flunitrazapam) of the superseding information, and his conditional plea to Count 2 (driving while

intoxicated) of the superseding information. (J.A. at 122). The Court dismissed all remaining counts of both information's pursuant to a plea agreement. Pursuant to F.R.C.P 11(a), the conditional plea preserved Mr. Hernandez right to appeal the denial of his motion for a jury trial on driving while intoxicated. (J.A. at 151). On May 25, 2007, the Court sentenced Mr. Hernandez on Count 1 to twenty-four months probation, a ten dollar special assessment, and a fine of five thousand dollars. One of the conditions of probation was service of ten days imprisonment. On Count 2, the Court sentenced Mr. Hernandez to thirty six months probation, a ten dollar special assessment, and a fine of one thousand dollars. One of the conditions of probation was service of sixty days imprisonment. (J.A. at 200).The Court further ordered that Mr. Hernandez be released on conditions pending appeal of the present issue pursuant to 18 U.S.C. 3143 (b). (J.A. at 200). On May 25, 2007, Mr. Hernandez noted his appeal.(J.A. at 205). On May 6, 2008, the Fourth Circuit Court of Appeals affirmed his conviction.

STATEMENT OF FACTS

As to the appealed conviction, driving while intoxicated, a summary of facts is as follows:

On October 1, 2006 at approximately one in the morning, United States Park Police Officer McKinney was monitoring northbound traffic on the George Washington Memorial Parkway when his radar showed a blue car traveling at a high rate of speed. He also saw the car cross out of its lane. Officer McKinney stopped the car and noticed an odor of alcohol coming from the driver, Aaron

Hernandez. After Mr. Hernandez performed poorly on field sobriety tests, Officer McKinney arrested him for driving while intoxicated and other charges. (J.A. at 144-145).

REASONS FOR GRANTING THE WRIT

This Court's current standard for evaluating what qualifies as a "petty offense" for the purposes of the right to a jury trial should be revisited because it is too rigid in that it does not adequately allow for a jury trial in cases society plainly views as serious. First, the increase in the public perception and stigma of driving while intoxicated across the nation renders that crime serious now, if was not in 1993 when the Court held, in United States v. Nachtigal, 507 U.S. 1 (1993), that a defendant charged with driving while intoxicated on federal property was not entitled to a jury trial. Second, the Court's application of the standard announced in Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989), and applied in Nachtigal rests upon the erroneous determination that the penalties imposed by the Code of Federal Regulations for crimes in national parks reflect society's view of the seriousness of the offenses. This cannot be true in light of the fact that Congress limited the authority of the Secretary of the Interior to punishments of six months or less *before even knowing* what offenses the Secretary would prohibit. Most strikingly, the present record uniquely illustrates inadequacy of the CFR penalties in reflecting societal judgments as to seriousness of crimes because Mr. Hernandez was convicted in this case of Possession of Flunitrazapam under the Code of Regulations – a crime for which he would not have been entitled to a jury trial under the Court's current

rulings because it carries only six months to serve under the CFR. However, Congress has clearly spoken on the seriousness of possession of flunitrazapam, defining it as a felony with up to three years incarceration in 18 U.S.C. 844. The Court's current standard, instead of helping lower courts define what is petty and what is serious, creates prosecutorial discretion over whether two precisely situated defendants get a jury trial for crimes committed on National Parks. This anomaly alone defeats the notion that the Secretary of the Interior's sentencing determinations reflects societal views of the seriousness of a crime. The standard is overly rigid, does not accomplish its purpose to define what crimes society views as serious, and must be revisited. Plainly, a third recent offense of driving while intoxicated is serious, and the standard must be reworked to include that in other serious crimes even when the statutory maximum is only six months imprisonment.

ARGUMENT

ISSUE 1- The current test for defining which offenses are serious for the purposes of the Sixth Amendment right to a jury trial does not adequately protect defendants because the current standard allows for the denial of the right to a jury trial in cases which are plainly viewed by society as serious, such as third offense DWI within five years.

ISSUE 2 The current test for defining which offenses are serious for the purposes of the Sixth Amendment right to a jury trial does not adequately protect defendants in crimes charged under the Code of Federal Regulations because the

CFR regulations do not represent a legislative judgment or society's view of the seriousness of offenses.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution provides for a jury trial in all criminal prosecutions. Where questions involve constitutional rights, the application of the rule of law to established facts requires de novo review, and the reviewing court must be able to find that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

I. THE EVOLVING NATURE OF LAW DEFINING "SERIOUS" OFFENSE

Article III and The Sixth Amendment to the United States Constitution have been interpreted to require a trial by jury for serious, as opposed to petty, crimes. Callan v. Wilson, 127 U.S. 540 (1888). While Courts have always recognized the need to delineate between serious crimes requiring a jury trial and smaller crimes allowing conviction and sentence by only a court, the method for defining the difference has constantly evolved. In Callan, the Court noted that the right to a jury trial was "to be interpreted in the light of principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury". Id. at 548. Later cases attempted to further define the difference between a serious and a petty offense. In District of Columbia v. Clawans, 300 U.S. 617 (1937), the Court addressed the issue of whether

a statute with a maximum jail sentence of ninety days triggered the right to a jury trial. In holding such a charge a petty offense, the Court noted that "At least sixteen statutes, passed prior to the time of the American Revolution by the Colonies, or shortly thereafter by newly created states, authorized summary punishment of petty offenses by imprisonment for three months or more." Id. at 626. The Court, however, further allowed that the common law on this and other points was an evolving issue:

> We are aware that those standards of action and of policy which find expression in the common law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial . . . Id at 627.

The standard evolved further, eventually mandating the right to a jury trial for any offense carrying a possible sentence of greater than six months. See Cheff v. Schnackenberg, 384 U.S. 373 (1966) (denying jury for crime carrying six months imprisonment); Duncan v. Louisiana, 391 U.S. 145 (1968) (granting jury for crime carrying two years imprisonment).

In Baldwin v. New York, 399 U.S. 66 (1970), the Court, noting the importance of "existing laws in the Nation", and that all states except New York granted the right to a jury trial where individual

liberty of more than six months was at stake, expanded the automatic right to a trial by jury to any crime carrying more than six months imprisonment.

In Blanton v. City of North Las Vegas, 489 U.S. 538 (1989), the Court laid out the most recent standard for defining a petty offense:

> Although we did not hold in Baldwin that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as petty. A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a serious one. Id. at 543.

While not overruling Baldwin on the question of whether "existing practices in the Nation" should be part of the analysis of the right to a jury trial, the Court in Blanton "declined the petitioner's invitation to survey drunken driving penalties in other states." Id. at f.n. 11. More recently, in United States v. Nachtigal, 507 U.S. 1 (1993), the Court declined to extend the right to a jury trial to a case brought under 36 C.F.R. 4.23(a)(1).

Plainly, the line between serious and petty offenses under the Sixth Amendment evolves. The standard set forth in Blanton, while focusing on

maximum incarceration and other statutory penalties, does not alter the common jurisprudential thread of the fundamental right to a jury trial – that defendants are entitled to a jury trial for crimes deemed serious by society. While Blanton provides an objective place to begin in determining which crimes are deemed serious by society, it does not supplant this subtle inquiry with a formulaic standard. See Blanton at fn. 11.("The question is not whether other states consider drunk driving serious – *but whether Nevada does.)* (emphasis added)).

II. MR. HERNANDEZ' CHARGED CRIME IS PLAINLY SERIOUS, AND YET FALLS OUTSIDE THE OVERLY RIGID BLANTON STANDARD. (J.A. at 18-24, 112).

Mr. Hernandez' crime should be regarded as serious for Sixth Amendment purposes. The standard set forth in Blanton forecloses consideration of the petty/serious distinction on a case by case basis.

A. "Additional Statutory Penalties" Ignores Relevant Serious Consequences that Should Play a Role in Determining What Crimes Society Views as Serious. (J.A. at 22).

In Blanton, the Court stated that a defendant could overcome the presumption denying him a jury trial for a six month offense if he could show that "additional statutory penalties" reflected a clear legislative determination that an offense was serious. Id. at 543. Blanton limits consideration of "statutory penalties" to those contained only in the charging

statute. By doing so, the standard ignores factors that plainly reflect society's opinion about the seriousness of DWI.

The CFR, created by the Secretary of Interior pursuant to 16 U.S.C. 3, and allowing a maximum penalty of six months for *any* CFR regulation, sheds only one ray of light on the question of whether DWI should be deemed serious – that the Secretary believes DWI should be punished as harshly as legally possible under the CFR. Congress delegated this sentencing authority to the Secretary of the Interior without knowing precisely what crimes would be created, a factor belying the notion that the maximum six month penalties under the CFR reflect societal opinion. The opinion of the Secretary of the Interior, an appointed national official whose normal duties do not include the fixing of criminal penalties, reflects the views of the United States in only the most strained way.[1] This is demonstrated by the fact

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[1] In Blanton, the Court stressed the importance of the fact that a *legislature* is specially equipped to define which offenses are serious: "The judiciary should not substitute its judgment as to seriousness for that of the legislature, which is far better equipped to perform the task. . ." Id. at 541. The policy behind deference to legislative judgments as society's view on the seriousness of DWI does not even apply to the CFR regulations. To the extent that CFR penalties can be said to reflect Congress' view, as noted in Nachtigal, the analogy falls apart when one considers the fact that the same defendant on the same national park can, for possession of flunitrazapam (or crack cocaine) be sentenced to up to three years in prison pursuant to 21 U.S.C. 844, or

that the Secretary's regulations as to the seriousness of DWI are at odds with the vast majority of jurisdictions in the United States.(J.A at 25, 54, and 70)(only 9 out of fifty states fail to provide a jury trial right in DWI cases.) In United States v. Lewis, 518 U.S. 322 (1996), the Court stated that:

> It is now well settled that legislature's determination that an offense carries a maximum term of imprisonment of six months or less indicates its view that an offense is "petty" . . . . . The maximum authorized penalty provides an "*objective indication of the seriousness with which society regards the offense.*"" Id. at 328 (citing Franks at 148). (emphasis added.)

The standard provides no guidance in a case where (1) the maximum punishment was not chosen by a legislature, (2) the legislature authorizing the creation of the regulation did so before even knowing what conduct would be prohibited, and (3) the entity choosing the six month penalty did not engage in balancing from of possible sentences, instead selecting the harshest one available. (Nothing about the choice of maximum penalty suggests that the Secretary of the Interior would not have preferred a harsher sentence.)

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only up to six months in prison under the CFR. This very case contains that anomaly, as Mr. Hernandez stands convicted of possession of flunitrazepam under the CFR. Under the Court's current standard, he had no right to a jury trial, yet Congress plainly views possession of flunitrazepam as serious.

Many "penalties" exist to which the Court could look to create a more meaningful standard. The Virginia state DWI penalties were both (1) chosen by the Virginia legislature, and (2) the product of balancing from a wide array of options.

Mr. Hernandez had committed two prior DWI offenses within five years. (J.A. at 163). Pursuant to Va. Code 18.2-270, Mr. Hernandez' offense would subject him to a Class Six Felony with a mandatory minimum prison term of six months. Further, pursuant to Va. Code 18.2-271, and 46.2-391, Mr. Hernandez would receive a minimum five year license suspension. These statutory penalties, while not the ones specifically faced by Mr. Hernandez under the CFR, more accurately reflect the seriousness of DWI than the CFR regulation. The trial court, at Mr. Hernandez' sentencing, properly described the DWI offense as "possibly more serious than, than drug dealers on the street, because driving automobiles is one of the most dangerous things people do." (J.A. at 190). The Court's statement, echoing those made in courts, rehab clinics, television commercials, and driving classes across the country, is just as true on a national park as it is fifty feet off the national park. It is manifestly obvious that society views a third offense DWI within five years as serious, and the Blanton standard should be changed to accommodate this common sense view.

B. Penalties Faced by Mr. Hernandez

The penalties actually faced by Mr. Hernandez, aside from the possibility of six months incarceration, transform his charge from a petty to a

serious offense. The Blanton standard ignores these factors and denies Courts the ability to balance important factors.

1. Comity Policy/Threat of Actual Incarceration (J.A. at 22).

Because Mr. Hernandez had two prior, and recent, DWI offenses, he faced more than the theoretical possibility of six months incarceration. The United States Magistrate Court for the Eastern District of Virginia, pursuant to its opinion in United States v. Barber, 360 F. Supp.2d 784 (2005), has decided "to impose the enhanced penalties set forth in Virginia Code 18.2-270" in cases charged under the CFR . Id. at 786. Thus, defendants in Magistrate Court in the Eastern District of Virginia are presently being sentenced to Virginia mandatory minimum sentences, inapplicable under the CFR, while at the same time being denied Virginia's right to a jury trial. In a pre-trial motion, Mr. Hernandez asked the District Court to disallow the policy as a violation of the Fifth and Sixth Amendments and section 18 U.S.C 3553. The District Court denied the motion in "most respects," but stated that "This Court will be sentencing the defendant using the principles of 3553 of Title 18. Regardless of what my colleagues in Magistrate Court, this is how I will approach this case." (J.A. at 108). The government, in its "Position on Sentencing" claimed that *Virginia State law* should be the *primary* factor in Mr. Hernandez' sentencing. The government stated:

Finally, and most importantly, a sentence of less than six months imprisonment would cause unwarranted disparities between the defendant and

other drivers convicted of alcohol impaired driving in Virginia.(J.A. at 164-165).

While the government conceded at sentencing that Section 3553 does not mandate consideration of disparity between state and federal defendants, (J.A. at 181), it again argued in Court that Virginia law should be considered. (J.A. at 182). The government's initial position and its in-court argument demonstrate the government's clear belief that Virginia mandatory minimums are an important part of DWI sentencing in federal court. [2] The government's belief that Virginia mandatory minimum sentences are the driving force of federal DWI sentencing is reasonable, at least in Magistrate Court for the Alexandria division of the Eastern District of Virginia, given the existence of the Barber opinion expressly laying down a rule that Virginia mandatory minimums should be followed.[3]

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[2] The District Court in this case, by denying Mr. Hernandez' motion to overrule Barber, did not prevent future defendants in Magistrate Court from being sentenced under Virginia law as a matter of comity.

[3] Counsel submits that Barber violates the principle set forth in United States v. Clark, 434 F.3d 684 (4th Cir. 2006)(holding that disparity with state defendants is not a proper consideration under 18 U.S.C. 3553). The trial judge properly disregarded Barber's "comity policy" in this case. Nevertheless, the government's position on sentencing demonstrates that a third-offense DWI defendant will at least face an argument that about Virginia law when sentenced in the Alexandria Division of the Eastern District of Virginia.

While Mr. Hernandez concedes that the District Court did not impose a Virginia mandatory minimum in this case, sentencing Mr. Hernandez instead to sixty days imprisonment, the Barber opinion and the position of the government render Mr. Hernandez' case dramatically more serious than other six month offenses under the CFR like speeding (36 CR 4.21), refusal (36 CFR 4.23(c)), or Failure to Stay in One Lane (36 CFR 4.2).

2. **Aggregation (J.A. at 22).**

In Lewis v. Commonwealth, 209 Va. 602 the Supreme Court held that the possibility of aggregation of six month offenses in a single proceeding does not transform an otherwise petty offense into a serious offense. However, this opinion does not forbid consideration of aggregation as a factor in whether a particular defendant faces a serious offense under the Sixth Amendment. At the time Mr. Hernandez' motion for a jury trial was denied, he faced five six-month offenses. Coupled with the virtual certainty of incarceration as discussed in section 1 above, the possibility of aggregation is a factor the Court should consider. Importantly, while the court did not impose an aggregate sentence of more than six months imprisonment to serve on the two crimes for which Mr. Hernandez was ultimately convicted, the government asked the Court to do so despite the fact that Mr. Hernandez had been denied the right to a jury trial. See Position of the United States on Sentencing. (Government asked the Court to sentence Mr. Hernandez to the Virginia mandatory minimum of six months for DWI, and an additional

term of live imprisonment for drug possession.)[4].(J.A. at 161-169).

3. License Suspension and Other Penalties

(J.A. at 18-24, 112).

In Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990), the Court held that on a third offense DWI, the mandatory fifteen year license suspension coupled with the possibility of six months incarceration reflected the Nebraska legislature's determination that a third offense DWI was a "serious offense." Id at 1205. In this case, in addition to a five thousand dollar fine (which was imposed), five years probation (three imposed), and

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[4] The holding of the Court in Lewis was joined by five Justices: O'Connor, Rehnquist, Scalia, Souter, and Thomas. Justice Kennedy concurred in the judgment only because "it was settled that {Lewis} could be sentenced to no more than six months imprisonment for his combined petty offenses." Id. at 330. (The trial Judge had promised Lewis a sentence of no more than six months, and gave that as the rationale for denial of Lewis' request for a jury.) Kennedy called the majority holding, that a defendant could be sentenced to unlimited incarceration without a jury so long as it was done through a series of six month offenses, "one of the most serious incursions on the right to a jury trial in the Court's history." Id. Justice Breyer joined his opinion. Justices Stevens and Ginsberg dissented. In the present case, the Court did not guarantee Mr. Hernandez a sentence of no more than six months at the time of the denial of his request for a jury.

the loss of his driving privilege, Mr. Hernandez faced an additional license suspension under the Virginia Code even though the case was prosecuted in federal court. Va. Code 46.2-391 (B) reads, in pertinent part:

> The Commissioner shall forthwith revoke and not thereafter reissue the driver's license of any person after receiving a record of conviction of any person (ii) convicted of three offenses arising out of separate occurrences within a period of ten years in violation of . . .18.2-266, or a substantially similar ordinance *in any other jurisdiction.* Va. Code 46.2-391.

While section 46.2-391(C) provides for possible reinstatement after five years, and possible restricted driving privileges after three years, the Virginia license suspension that will accompany Mr. Hernandez' conviction is similarly onerous to that which transformed a petty offense to a serious offense in Richter. Revocation of a license to operate a motor vehicle very often can work as a substantial hardship on its holder. Richter at 1204 (citing Arsinger v. Hamlin, 407 U.S. 25 (1972)(Powell, J. concurring)("revocation of a driver's license is more serious for some individuals than a brief stay in jail). The license suspension should be considered along with the other factors which render Mr. Hernandez offense serious.

III. BLANTON AND NACHTIGAL DO NOT ADEQUATELY DEFINE WHICH OFFENSES ARE SERIOUS UNDER THE SIXTH AMENDMENT (J.A. 18-24, 112).

Blanton was decided in 1989. Nachtigal was decided in 1993. Since 1993, society's view of the crime of driving while intoxicated has become increasingly more serious. Even a brief analysis of Virginia DWI law, and the history of Va. Code 18.2-270, demonstrates this trend. In 1997, the mandatory minimum sentence for a second offense DWI within five years was two days regardless of blood alcohol level. Today, the mandatory minimum for such an offense is ten days for blood alcohol levels *below* .15.(The penalties are greater for higher blood alcohol levels.) In 1997, the mandatory minimum for a third offense DWI within five years was thirty days, regardless of blood alcohol level. Today such an offense is a felony carrying a six month mandatory minimum. In 2000, Virginia law provided no mandatory minimum penalties based upon higher blood alcohol levels. Today, blood alcohol levels of greater than .15 and greater than .20 carry mandatory jail time. In 1994, the blood alcohol threshold for DWI was .10. Today, the presumptive level in all fifty states is .08 according to Drinking and Driving in America, a MADD and Nationwide Insurance Survey Conducted by the Gallup Organization (2005) (attached as Exhibit A in Joint Appendix). According to this study, public awareness of the seriousness of drunk driving has increased between 1993 and 2005. The MADD study demonstrates this by reference to certain statistical factors such as (1) percentage of people who have discouraged a drunk driver in the past week, (2)

percentage of people who have been successful in encouraging someone not to drive, (3) embarrassment within the community as a reason not to drink and drive, (4) pressure from friends as a reason not to drink and drive, (5) advertisements showing consequences of drinking and driving as a reason not to drink and drive, (6) fear of losing one's license as a reason not to drink and drive, and (7) fear of a jail sentence as a reason not to drink and drive. Interestingly, fear of killing oneself or others has gone down as a reason not to drink and driving – supplanted by factors such as tough sentencing and social stigma. Throughout the MADD report, one can see the effect of society's harsher views of and harsher laws towards DWI in the past fifteen years. Societal views have reduced drinking and driving through laws and public pressure. If drunk driving was petty offense before, it is serious now.

In 2008, society clearly recognizes DWI as serious, particularly a third offense in five years, regardless of whether the Secretary of the Interior has been granted the authority to create punishments of greater than six months imprisonment. The Blanton standard, if read as suggested by the government, is overly rigid, honors form over substance, and fails to adequately protect the Sixth Amendment right to a jury trial for serious offenses. By allowing the government to eliminate the right to a jury trial by limiting imprisonment to six months incarceration unless the defendant can show that the actual statute at issue carries other sufficiently onerous burdens, Courts endorse a dangerous standard that could result in draconian ancillary consequences without a right to a jury trial – such as sex offender registration, deportation, and

other life altering punishments outside the purview of Blanton.

VI. Blanton and Nachtigal allow prosecutorial discretion, and not society's view of the seriousness of an offense, to govern the right to a jury trial since Congress provides different maximum penalties than the C.F.R. for the same exact offenses.

Mr. Hernandez appeals only the denial of his right to a jury trial on DWI under 36 C.F.R. 4.23 (a)(2). However, in this very case, he was also convicted of an offense which precisely illustrates the un-workability of the Blanton standard. He was charged in a superceding information alleging:

On or about October 1, 2006 at the George Washington Memorial Parkway, in the Eastern District of Virginia, the defendant, AARON HERNANDEZ, did unlawfuly and knowingly possess Flunitrazeoan, a Schedule IV controlled substance . . . in violation of *Title 36, Code of Federal Regulations, Section 2.35(b))(2).* (emphasis added).

Title 36 CFR 2.35(b)(2), possession of a controlled substance, carries a maximum penalty of six months incarceration, and consequently does not mandate a right to a jury trial. Congress has made the legislative determination that possession of certain controlled substances should be punished as felonies which do mandate the right to a jury trial.

In Nachtigal, this Court stated:

> The Court of Appeals refused to apply the Blanton presumption, reasoning that the Secretary of the Interior, and not Congress, ultimately determined the maximum prison term. But there is a controlling legislative determination present within the regulatory scheme. In 16 U.S.C. 3, Congress set six months as thr maximum penalty the Secretary could impose for a violation of any of his regulations. The Court of Appeals offered no persuasive reason why this congressional determination is stripped of its "legislative" character merely because the Secretary has final authority to decide, within the limits set by Congress, what the maximum prison sentence will be for any regulation. Id. at 4.

Mr. Hernandez offers three persuasive reasons that the Secretary of the Interior's maximum punishment determinations are stripped of their legislative character. First, the authority granted to the Secretary under 16 U.S.C. 3 was granted without any regard to what specific crimes would be punished under the CFR. Thus, the six month maximum cannot reflect society's view, as seen by Congress, of the seriousness of any offense. Second, courts cannot glean anything important from the Secretary's decision to make six months the maximum penalty for driving while intoxicated on a National Park. He very well may have, like almost all states, believed the punishment should be higher. The notion that society views driving while intoxicated on state parks as "petty" because the CFR regulations carry only six months is a true legal fiction which is at odds with the Court's historical attempts to fashion an objective test that actually

reflects societal views of a crime. Third, and most strikingly in this case, the Secretary of the Interior *disagrees* with Congress about the seriousness of crimes. By criminalizing drug possession, including possession of crack cocaine and flunitrazepam, the Secretary supplanted society's view, set forth in 21 U.S.C. 844, that possession of crack cocaine and flunitrazepam should be felonies. Thus, prosecutors, and not an objective test crafted to reflect society's views, decide who gets a jury trial on National parks.

The Blanton Standard must be changed, at least as it applies to the Code of Federal Regulations. As applied to the CFR, its anomalous exceptions destroy the integrity of the rule.

V. MR. HERNANDEZ POSITION(S) ON HOW TO DEFINE SERIOUS OFFENSES FOR SIXTH AMENDMENT PURPOSES

Many alternatives would provide a more workable standard than Blanton in determining what is a petty offense: (1) this Court could fashion a standard identical to Blanton which recognizes that in CFR cases the "maximum penalty" for Blanton purposes should be either Congress' determination (like with crack cocaine or flunitrazepam in 18 U.S.C. 841) or a State determination by locality (like with DWI or Reckless Driving). Under such a standard, the objective test in Blanton could retain its integrity as truly reflecting societal notions of seriousness. (2) In the alternative, the Court could allow additional societal penalties (like license suspensions), other than those contained in the charging statute, to enter the equation as to whether

society views a crime as serious. Such a standard would allow a crime about which society's view has changed, like DWI, to be incorporated in a principled manner; (3) In the alternative, the Court could fashion a rule that allows actual incarceration to play a factor in the analysis. Such a standard would eliminate the absurdity of situations like Mr. Hernandez', where the Blanton standard tells us that a third DWI in a few years is petty – even when the government seeks application of a state mandatory minimum penalty of six months *to serve*. Fourth, the Court could fashion a rule allowing the right to a jury trial in any case where actual incarceration will be imposed.

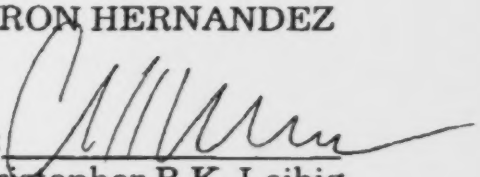
The Blanton standard does not properly govern the petty/serious distinction in CFR cases. Mr. Hernandez faced a serious charge. His case should be remanded for a jury trial

CONCLUSION

Based on the foregoing arguments, Mr. Hernandez' prays that this Court grant his petition for certiorari.

Respectfully submitted,

AARON HERNANDEZ

By: 

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No. 08-158

In The Supreme Court of the United States

AARON HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4558

UNITED STATES OF AMERICA

Plaintiff - Appellee,

v.

AARON HERNANDEZ,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge (1:07-cr-00065-LMB

Argued: March 18, 2008 Decided: May 6, 2008

Before WILKINSON and MOTZ, Circuit Judges, and William L. OSTEEN, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Christopher Robert Kennedy Leibig, ZWERLING, LEIBIG & MOSELEY, P.C., Alexandria, Virginia, for Appellant. Jennifer Lee, *OFFICE OF THE UNITED STATES ATTORNEY*, Alexandria, Virginia, for Appellee. **ON BRIEF**: Chuck Rosenberg, United States Attorney, Alexandria, Virginia for appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIANM:

Aaron Hernandez appeals his order of conviction and sentence for driving while intoxicated ("DWI") on the George Washington Memorial Parkway, in violation of 36 C.F.R. § 4.23 (a) (1). Hernandez argues that he was entitled to a jury trial on that charge. This contention, however, is foreclosed by the Supreme Court's holdings in Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989) and United States v. Nachtigal,, 507 U.S. 1, 6 (1993), which make clear that there is no right to a jury trial for petty offenses, and specifically, no right to a jury trial for alleged violations of 36 C.F.R. § 4.23 (a) (1). Therefore, we affirm the judgment of the district court.

I.

Around 1 a.m. on October 1, 2006, Hernandez was traveling northbound on the George Washington Memorial Parkway in his Jaguar when United States Park Police Officer Evan McKinney clocked his speed at approximately seventy-five miles per hour in a properly posted fifty mile-per-hour zone. After observing Hernandez cross the center line twice, Officer McKinney initiated a traffic stop. As he approached Hernandez's car, Officer McKinney detected the smell of alcohol coming from Hernandez. Officer McKinney then administered standard field sobriety tests, which Hernandez did not complete successfully. Hernandez was arrested, and a chemical analysis of his blood sample confirmed that his blood alcohol level was .13g/100mL.

On November 16, 2006, Hernandez was charged with various driving related offenses, including possession of a Schedule IV controlled substance in violation of 21 U.S.CF. § 844 (amended by the superceding criminal information as a violation of 36 C.F.R.§ 2.35 (b) (2)); and DWI in violation of 36 C.F.R. § 4.23 (a) (2) (count two). The DWI offense, as charged under 36 C.F.R. § 4.23 (a) (2), carries a maximum penalty of six months' incarceration, a $5000.00 fine, and a $10.00 special assessment. 36 C.F.R. §§ 1.3 (a); 18 U.S.C. §§ 3571 (b) (6) and (e) (2000). As an alternative to imprisonment for a violation of 36 C.F.R. § 4.23 (a) (1), the sentencing court may impose a term of probation not to exceed five years. 18 U.S.C. § 3561 (a) (3). The sentencing court has discretion to attach various conditions to the probationary term. Id. §3563 (b).

Hernandez filed a motion for jury trial on the DWI offense. He argued that because this wold be his third DWI conviction in five years and could potentially lead to penalties beyond the maximum six months' incarceration under the C.R.R., the charge was serious enough to warrant a Sixth Amendment right to jury trial. Relying upon the Supreme Court's decisions in Blanton and Nachtigal, the district court denied Hernandez's motion. Specifically, the district court stated that because DWI under 36 C.F.R. § 4.23 (a) (1) carries a maximum term of imprisonment of six months, it is presumptively a "petty" offense which does not carry a right to trial by jury under the Sixth Amendment. Moreover, the district court rejected Hernandez's argument that additional penalties under either 36 C.F.R. § 4.23 (a) (1) or under Virginia recidivism statutes transformed DWI into a "serious" offense for purposes of the Sixth Amendment.

On March 14, 2007, Hernandez entered a guilty plea to counts one and two with a reservation of his right to appeal the district court's denial of his motion for a jury trial on the DWI offense. For court one, Hernandez was sentenced to two years' supervised probation with the special condition that he serve ten days' incarceration, a $5000.00 fine, and a $10.00 special assessment. For count two, the DWI, Hernandez was sentenced to three years' supervised probation with the special condition that he serve sixty days' incarceration, a $1,000.00 fine, and a $10.00 special assessment.

Hernandez timely appeals.

II.

Hernandez maintains that he has a Sixth Amendment right to a jury trial on the DWI charge. In order to determine whether a right to jury trial attaches to a particular offense, courts must examine "objective indication of the seriousness with which society regards the offense." Blanton, 489 U.S. at 541. "The best indicator of society's views is the maximum penalty set by the legislature," with the primary emphasis being upon "the maximum authorized period of incarceration." Nachtigal, 507 U.S. at 3. Where a maximum prison term for an offense is no higher than six months, the offense is presumed to be "petty," even if accompanied by additional penalties, and thus no right to jury trial attaches. Blanton, 489 U.S. at 543. While this presumption can be overcome by a showing that such additional penalties "viewed in conjunction with the maximum authorized period of incarceration . . . are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious one," id., the Supreme Court has held that the additional penalties for DWI set forth in 36 C.F.R. § 4.23 (1) (2) do not render that offense "serious" for purposes of the Sixth Amendment. Nachtigal, 507 U.S. at 5-6.

In the fact of this directly controlling Supreme Court precedent, Hernandez nonetheless contends that his DWI is "serious" for the Sixty Amendment purposes because of (1) "additional statutory penalties" found in Virgir a recidivism statutes; (2) the unique circumstances of his particular DWI offense; and (3) evolving societal views of driving while intoxicated. We address each of these arguments in turn.

A.

Hernandez contends that "additional statutory penalties: found in Virginia recidivism statutes - - statues under which he was not charged - - render his DWI offense a "serious" one for Sixth Amendment purposes. Specifically, Hernandez points out that, although he was charged with DWI under 36 C.F.R. § 4.23 (a) (2), this court should consider that had he been charged under the relevant Virginia DWI statutes, he would have been subject to a mandatory minimum prison term of six moths and a minimum five year license suspension. Va. Code. Ann. §§ 18.2-270, - 271, 46.2-391 (2005). Hernandez also claims that the penalties contained in 36 C.F.R. § 4.23 (a) (1) do not truly reflect a "legislative" judgment regarding the seriousness of the DWI offense because the relevant regulation was created by the Secretary of the Interior.

These Arguments are all foreclosed by the Supreme Court's decision in Nachtigal. As to Virginia recidivism statutes, Hernandez points to no case indicating that we should look to penalties prescribed by statutes under which he was not even changed to determine whether his crime entitles him to a jury trial. In fact, the Supreme Court expressly instructs that laws passed by different legislatures are "irrelevant to the question whether a particular legislature deemed a particular offense 'serious. ' " Nachtigal, 507 U.S. at 4 (citing Blanton, 489 U.S. at 545, n.11). Here, Hernandez faced only those penalties associated with a DWI offense charged under the C.F.R. It is therefore the legislative judgment contained in 36 C.F.R. § 4.23 (a) (1) and the Supreme Court's holding that § 4.23 (a) (1) is a petty offense that

guides our analysis and requires us to reject Hernandez's argument that "additional statutory penalties: render his DWI offense "serious" for purposes of the Sixty Amendment.

As to the role of the Secretary of the Interior, the Supreme Court expressly held that 36 C.F.R. § 4.23 (a) (1) is not "stripped of its 'legislative' character merely because the Secretary of [of the Interior] has final authority to decide, within the limits given by Congress, what the maximum prison sentence will be for a violation of a given regulation." Nachtigal, 507 U.S. at 4.

B.

Hernandez next contends that the unique circumstances of his particular DWI offense render it "serious" for purposes of the Sixth Amendment. Hernandez argues that additional penalties he potentially faced as third-time DWI offender (beyond the possibility of six months of incarceration under 36 C.F.R. § 4.23 (a) (1)) render his particular DWI "serious." Specifically, Hernandez maintains that because he faced both the possible aggregation of penalties on his two separate petty offenses and the collateral consequence of license revocation under Virginia law, he was entitled to jury trial.[1]

---

[1]Hernandez also argues that the mandatory minimum sentence of incarceration for a third DWI under Va. Code Ann. § 18.2-270, which might have been (but was not) imposed upon him pursuant to Virginia's comity policy, renders his DWI offense "dramatically more serious than other six month offenses under the CFR." We again decline Hernandez's invitation to make a determination regarding the seriousness of his DWI offense

Hernandez's first argument - - that the potential aggregation of penalties for two separate petty offenses renders his DWI "serious" for Sixth Amendment purposes - - is also foreclosed by Supreme Court precedent. The Supreme Court has made clear that being "charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of [a] particular offense, not does in transform the petty offense into a serious one." Lewis v. United States, 518 Y,/s, 322m 327 (1996). Moreover, the district court did not even impose an aggregate sentence os more than six months incarceration on the two petty offenses for which Hernandez was convicted.

Supreme Court precedent also forecloses Hernandez's argument that the loss of driving privileges he potentially faces under Virginia law for a third DWI conviction render his DWI offense "serious" for Sixth Amendment purposes. In Nachtigal, the Supreme Court held that the regulatory revocation of the defendant's license was "constitutionally significant" in regard to the right to a trial by jury. 507 U.S. at 4. We therefore reject Hernandez's argument that the circumstances of his case render his DWI conviction uniquely "serious" under the Sixty Amendment.

---

based upon a survey of penalties contained in statutes under which he was neither charged nor sentences. See Nachtigal, 507 U.S. at 4.

C.

Finally, Hernandez argues that we should revisit the standard for defining the "seriousness" of an offense set forth by the Supreme Court in Blanton and find that a DWI is indeed a "serious" offense for purposes of the Sixth Amendment. In particular, Hernandez contends that the development of Virginia's drunk driving laws and of society's views regarding the seriousness of drunk driving offenses demonstrate that "the line between serious and petty under the Sixth Amendment evolves."

It goes without saying that the decision of the Supreme Court bind the circuit courts of appeals. We accordingly shall not adopt Hernandez's proposed common-law methodology for determining whether an offense is "serious" for purposes of the Sixth Amendment - - a methodology the Supreme Court explicitly rejected in favor of the objective, statutory-maximum-penalty analysis we applied above. See, e.g. , Lewis,518 U.S. at 326-27.

For the foregoing reasons, we affirm the judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

v. Case Number1:07cr00065-001

AARON HERNANDEZ

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant, AARON HERNANDEZ, was represented by Christopher Leibig, Esquire.

The defendant pleaded guilty to count(s) 1 and 2 of the Superseding Criminal Information. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
36 CFR 2.35(b)(2)	Possession of Flunitrazepam (Sch.IV) (Petty Offense)	10/1/2006	1
36 4.23 (a)(2)	Driving While Intoxicated w/BAC of .08 grams or more (Petty Offense)	10/1/2006	2

As pronounced on May 17, 2007, the defendant is sentenced as provided in pages 2 through 6** of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT US FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all find, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this 17th day of May, 20007.

_____

Leonie M. Brinkema
United States District Judge

Defendant: AARON HEERNANDEZ
Case Number: 1:07cr00065-001

PROBATION

The defendant is hereby placed on probation for a term of THIRTY-SIX (36) MONTHS.

TWENTY-FOUR (24) MONTHS as to Count 1

THIRTY-SIX (36) MONTHS as to Count 2, to served concurrently with the term of probation imposed on Count 1.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of probation.

While on probation, the defendant shall not commit another federal, state, or local crime.

While on probation, the defendant shall not illegally possess a controlled substance.

While on probation, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF PROBATION

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia

related to such substances, except os prescribed by physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: AARON HERNANDEZ
Case Number 1:07cr00065-001

SPECIAL CONDITION OF PROBATION

While on probation, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) Within thirty (30) days from the date of the judgment order, the defendant shall serve a term of ten 10 days in a jail-type facility for five (5) consecutive weekends as directed by the probation officer, as a condition of the probation imposed on Count 1.

2) The defendant shall serve sixty (60) days in a jail-type facility, as a condition of the probation imposed on Count 2. Execution of this special condition is stayed until further order of the Court.

3) The defendant must remain drug free and submit to mandatory drug testing for which the defendant must pay. The defendant must satisfactorily participate in, and complete, any inpatient or outpatient drug treatment to which the defendant is directed by the probation officer.

4) The defendant shall have an Interlock Ignition System installed on his car within two (2) weeks.

5) The defendant cannot drive between the hours of 10:00 P.M. and 6:00 A.M.,unless prior approval from the probation officer.

6) The defendant is allowed to drive during the day to and from work, to attend meetings with attorneys, the probation officer and any counselors; for legitimate medical appointments; to attend bona fide religious services; to attend court proceedings and if there is a special need, the defendant must obtain prior approval from the probation officer.

Defendant: AARON HERNANDEZ
Case Number: 1:07cr00065-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payment set out below.

Court	Special Assessment	Fine
1	$10.00	$5,000.00
2	$10.00	$1,000.00
Total	**$20.00**	**$6,000.00**

FINE:

The fine in the amount of $6,000.00 is due and payable immediately. The fine imposed shall be paid in full by the end of the term os supervised probation.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal: (4) cost of prosecution; (5) interest; (6) penalties.

The special assessment is due in full immediately. If not paid immediately, the Court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulation of the Bureau of Prisons.
Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, Unites States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

All